86 1724 (1)
No. -

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MARTIN E. O'MALLEY

Petitioner,

vs.

XEROX CORPORATION, a Corporation;
JOHN M. JETT, and WALDAMAR W. MILLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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91 pp

QUESTIONS PRESENTED FOR REVIEW

A. Did Petitioner receive notice of all proceedings in the Superior Court of California as required by the Fourteenth Amendment to the Constitution of the United States?

B. Did Petitioner have an opportunity to be heard in the Superior Court of California as required by said Fourteenth Amendment?

C. Was Petitioner denied due process by the Court of Appeal in in the use of Appendix H to sustain the ruling of the Superior Court?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings in the California Court of Appeal other than those set forth in the caption of the case before this Court.

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MARTIN E. O'MALLEY,
Petitioner,

vs.

XEROX CORPORATION, et al,
Respondents

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Martin E. O'Malley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California entered in the above-entitled case on October 24, 1986.

I.

OPINIONS BELOW

The opinion of the Court of Appeal, unreported, is printed in Appendix A

hereto. The denial of the Court of Appeal for a rehearing is printed in Appendix B hereto. The denial of the California Supreme Court for a review of the case is printed in Appendix C hereto. The judgment of the Los Angeles Superior Court is printed in Appendix D hereto. The denial of the Superior Court of the motion for reconsideration is printed as Appendix E hereto.

II.

JURISDICTION

The opinion of the Court of Appeal (Appendix A) was entered on October 24, 1986. A timely petition for rehearing (Appendix B) was denied on November 14, 1986. A petition for review in the California Supreme Court (Appendix E) was denied on January 27, 1987. The jurisdiction of the Supreme Court is

invoked under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (28 USC §1257(2)).

III.

STATUTE INVOLVED

The Fourteenth Amendment to the Constitution of the United States (28 U.S.C. §1257 (2))

IV.

STATEMENT OF THE CASE

On November 30, 1984, Petitioner filed a complaint in the Superior Court of California. The complaint contained the following causes of action:

1. Breach of Contract;
2. Tortious Interference with Contract;
3. Fraud;
4. Bad Faith Breach of Contract;
5. Intentional Infliction of Emotional

Distress; and

6. Negligent Infliction of Emotional Distress.

On January 16, 1985, Xerox Corporation, et al, filed an answer to the complaint. On September 17, 1985, Xerox Corporation, et al, filed a motion for summary judgment with respect to the following causes of action, listing said causes of action as claims:

1. Breach of Contract;

2. Fraud;

3. Intentional Interference with Contractual Advantage; and

4. Intentional Infliction of Emotional Distress.

On November 1, 1985, a hearing was held in the Superior Court of California. At the conclusion of the hearing, the Honorable Daniel L.

Fletcher, Judge, gave the Petitioner 30 days leave to amend the complaint, and directed the attorneys for Xerox to prepare the appropriate ruling.

On November 5, 1985, Judge Fletcher signed a ruling which granted the summary judgment, and dismissed the case.

On December 2, 1985, Petitioner filed a motion for reconsideration.

On December 27, 1985, a hearing on the motion was held. At the conclusion of the hearing, Petitioner advised the court that he had been deprived of an opportunity to be heard and he would appeal the ruling. Petitioner was not afforded an opportunity to allege specifically the failure of due process in violation of the Fourteenth Amendment of the United States Constitution.

V.

ARGUMENT

A. Meetings of defense counsel with Judge Fletcher in chambers without notice to Petitioner violated the due process clause of the Fourteenth Amendment.

On or about October 24, 1985, Xerox defense counsel met with Judge Fletcher in his chambers. They convinced Judge Fletcher that (i) Petitioner was a disgruntled ex-employee, (ii) Jett had a legitimate business reason to terminate Petitioner, (iii) Petitioner had a full hearing on the breach of contract cause of action in the Federal Court and (iv) the complaint was frivolous and an unwarranted waste of the Court's time.

One of the defense counsels, William C. Bottger, Jr., filed a false

declaration to that effect. Attached to the declaration was Appendix F. The original copy of Appendix F was furnished to Petitioner as part of the motion for summary judgment. Dan Guerrero had Appendix G retyped without the "offer accepted" provision. Guerrero then signed a letter dated "August 20, 1979" on or about August 20, 1985.

Also presented to Judge Fletcher in chambers on or about October 24, 1985 was Appendix H with enclosures 1 and 2. The enclosures have been withheld from Petitioner.

On November 5, 1985, a second meeting was held in Judge Fletcher's chambers. Once again, Petitioner did not receive notice. Per Judge Fletcher's request, Xerox defense

counsel, Brian Becker, had prepared a ruling giving Petitioner 30 days leave to amend. It is standard practice for Judge Fletcher's clerk to ensure that all rulings submitted for signature are consistent with the clerk's minute order. On November 18, 1986, Xerox defense counsel mailed Judge Fletcher's ruling to the court. In the letter of transmittal, Becker advised the clerk that Judge Fletcher had signed two rulings and that he (Becker) had chosen the more appropriate ruling.

On or about December 23, 1985, another meeting was held in Judge Fletcher's chambers. It was agreed that Petitioner would not be permitted to discuss Appendix H or Becker's false declaration, Appendix I, during the hearing on the motion for

reconsideration.

In ESTATE OF BUCHMAN, (1954) 123 California Appellate 2nd 546, (267 Pacific 2nd 13) the executor of an estate was removed without an opportunity to be heard. At pages 559, 560 and 561, in it's conclusion, the Supreme Court of California held: "The fundamental conception of a court of justice is condemnation only after notice and hearing..." "[13] Under the constitutional guarantees no right of an individual, valuable to him pecuniarily or otherwise can be justly taken away without its being done conformable to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides. [14] Due process of law does not mean according to the whim, caprice, or will

of a judge (Citation); it means according to law. It excludes all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence. (Citation)

Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice... [15] When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure... [16] Procedure is the fair, orderly, and deliberate method by which matters are

litigated. [17] To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly.

The constitutional right to notice and hearing cannot be taken away in the fashion that was attempted in the present case. The judge's conception of his duty was entirely erroneous. Appellant was not only not accorded a just, fair, and impartial hearing; he was not accorded the right or opportunity of any hearing..."

HUGONY v. LA GUARDIA, (1952) 110 California Appellate 2nd 433 (242

Pacific 2nd 893) was an action to recover treble damages for over charge of rent.

The State Court of Appeal addressed the due process aspect of the case on page 435 as follows:

"[3] Moreover, service of notice was required by constitutional law. Due process is involved. 'Whatever the character of the proceeding by which one is deprived of his property, and whether it takes the property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for notice, and opportunity to be heard, or the proceeding will want the essential ingredient of due process of law.' (Syllabus from 12 West's Cal.Dig. 532, and cases therein cited.)"

B. Reversal of the ruling granting 30 days leave to amend deprived Petitioner of an opportunity to be heard as required by the Fourteenth Amendment.

The right to be heard includes the right to know why a cause of action is dismissed. In the hearing, Judge Fletcher said, "Now, I agree with the defendant in this case, is that this part was already litigated in the federal court. It was determined by the federal court that there was no contract upon which a cause of action could be based, and so we have in the State Court, such a result is called estoppel, you are estopped; that is, you cannot -- you are prevented from bringing this action again in a federal court -- state court, because a federal court has already decided it.

You want to be heard on that point?

MR. O'MALLEY: The federal ruling only related to the federal grounds. The federal grounds were age discrimination, and that was dismissed with prejudice.

THE COURT: How does your claim differ here?

MR. O'MALLEY: Okay. In the federal case I had age discrimination and I also had several state-related or authorized offenses -- defamation, breach of contract and intentional infliction of emotional distress.

THE COURT: That we will take up later, I have these categorized separately. What we are talking about now is breach of contract. Seems to me the federal court already decided against you on the breach of contract.

MR. O'MALLEY: The only part of the case, though, that was dismissed with prejudice were the age discrimination and defamation; the balance of the case was not dismissed with prejudice.

THE COURT: If it was dismissed, doesn't matter whether it is with prejudice or not with prejudice, it is dismissed, it is estoppel, you are in state court. That explains the best I can that ground.

In the hearing on November 1, 1985, Judge Fletcher also stated: "Now you also allege fraud. This case, fraud, any cause of action for fraud is barred by the statute of limitations because you were hired on August 23, 1979, and at that time the fraud must have occurred at that time, otherwise there would be no reason for discharge. In

other words, if you took the job because of fraud that happened in 1979 -- you were discharged in 1980 -- so this complaint wasn't filed until 1984. So, fraud is barred by the statute of limitations.

MR. O'MALLEY: The fraud was in the discharge itself.

THE COURT: That is not the way it is alleged, and I don't see how it could be that way.

MR. BECKER: Your Honor, even if the fraud is in the discharge itselt, it was in 1980; I mean it is still over three years.

MR. O'MALLEY: The statute of limitations on fraud doesn't begin to run until it was discovered and I am saying I have been prevented from discovering that fraud by the Anderson

memorandum, No. 17 in his approved -- in his motion for undisputed facts. I have never seen that memorandum.

THE COURT: Well, then, you have not been -- then you have no evidence of discharge. What I am talking about is what I have before me now in the complaint. I can only rule on the complaint, what is in the complaint, I can't rule on anything outside the complaint."

Judge Fletcher concluded the hearing on the following note:

"Now, there is one point -- I might say this in my ruling, that I am going to allow you to amend the complaint, 30 days' leave to amend, keeping in mind all that I have said here. And if you can allege this in a different way to comply with the law the way I have

stated it, then you perhaps could state a cause of action in some parts of this.

That ruling is final now, and I am going to grant the motion for summary judgment and order that defense counsel prepare the order and give notice."

MR. BECKER: Yes, Your Honor.

MR. O'MALLEY: Thank you, Your Honor.

(Proceedings concluded.)

In granting the 30 days leave to amend, Judge Fletcher effectively cut off further argument.

Petitioner had no opportunity to discuss the manufactured evidence which led to the finding of "at will" employment. Petitioner had no opportunity to discuss the fact that Appendix G was a contract to which the 4 year Statute of Limitations applied.

Petitioner had no opportunity to

discuss the fact that the Statute of Limitations for Fraud begins to run from the date of the discovery of the Fraud not when it "could" or "should" have been discovered.

Petitioner had no opportunity to discuss the fact that Intentional, as well as Negligent, Infliction of Emotional Distress did not cease on December 5, 1980.

In WISCONSIN v. CONSTANTINEAU, (1971) 400 U.S. 433, The police chief of Hartford, Wisconsin, pursuant to a state statute, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquor to appellee, a resident of that city, were forbidden for one year.

At page 436, the Supreme Court held: "It would be naive not to

recognize that such °posting' or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasijudicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter." 302 F. Supp., at 864.

At page 437, the Supreme Court added: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it

is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."

JOINT ANTI - FASCIST COMMITTEE v. MC GRATH, (1951) 341 U.S. 123. Purporting to act under Part III, # 3 of Executive Order No. 9835, the Attorney General, without notice or hearing, designated the three petitioner organizations as Communist in a list furnished to the Loyalty Review Board

for use in connection with determinations of disloyalty of government employees. Petitioners sued for declaratory judgments and injunctive relief.

At pages 170 and 171, the Supreme Court held: "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument

on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations and admonition of Mr. Justice Holmes becomes relevant. °One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point...' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. Compare Brown, The French Revolution in English History. °The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.' UNITED STATES ex rel. KNAUFF v. SHAUGHNESSY,

338 U.S. 537, 551 (dissenting). Appearances in the dark are apt to look different in the light of day.

DATTA v. STAAB, (1959) 173 California Appellate 613 (343 Pacific 2nd 977), makes two points with respect to due process.

First, at page 621, "[16] Due process does not guarantee either a correct decision or consistency in decision."

Second, at page 622, "[17] There are two essentials to due process in a judicial proceeding; (1) the court must have jurisdiction over the parties and the subject matter of the action, and (2) the parties must have reasonable notice and an opportunity for hearing."

A further definition of

"opportunity to be heard" was advanced in BAKER v. BAKER, (1902) 136 California 302 (68 Pacific 971). The Court of Appeal, at page 305, held: No valid order or judgment affecting a person or his property can be rendered against him without a hearing or an opportunity to be heard. This is a rule of law so well understood as to be elementary, at least since the famous Dartmouth College case. As said in HITE v. HITE, 124 Cal. 393: "To satisfy the requirement of due process of law it is not always necessary that such trial should be afforded as is had in ordinary suits in courts of justice. The hearing allowed must be such as is practicable and reasonable in the particular case... sooley says, °the opportunity to be heard must be such as the settled maxims

of law permit and sanction, and under such safe-guards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs'.

And again, in SPECTOR v. SUPERIOR COURT, (1961)55 California 2nd 839 (13 California Reporter 189), the Court of Appeal, at pages 843 and 844, held: "Second. In proceeding No. 91313 was petitioner deprived of his day in court? Yes. On December 21, 1960, when petitioner's motion for an order modifying the preliminary injunction came on for hearing, Judge Cotton refused to permit counsel for petitioner to present any evidence or argument in support of his client's position.

[3] It is a cardinal principle of our jurisprudence that a party should

not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be duly cited to appear and afforded an opportunity to be heard and to offer evidence at such hearing in support of his contentions.

[4] His right to a hearing does not depend upon the will, caprice or discretion of the trial judge who is to make a decision upon the issues.

An order or judgment without such an opportunity is lacking in all the attributes of a judicial determination. (MC CLATCHY v. SUPERIOR COURT, 119 Cal. 413, 418, 421 [51 P. 696, 39 L.R.A. 691]; COLLINS v. SUPERIOR COURT, 145 Cal.App.2d 588, 594 [4] [302 P.2d 805]; ESTATE OF BUCHMAN, 123 Cal.App.2d 546,554 [5], 560 [267 P.2d 73, 47

A.L.R.2d 291] [hearing denied by the Supreme Court].)

[5] Refusal to permit counsel for petitioner to present evidence and make a reasonable argument in support of his client's position was not a mere error in procedure. It amounted to a deprival of a substantial statutory right and is not covered by article VI, section 4 1/2, of the Constitution. PEOPLE v. SARAZZAWSKI, 27 Cal.2d 7, 17 [13] et seq. [161 P.2d 934].)

C. The Court of Appeal erred in using an internal business letter which had never been introduced in evidence prior to the November 1, 1985 hearing to sustain the ruling of Judge Fletcher dated November 5, 1985.

Despite the fact that Judge Fletcher had stated, "Seems to me the

federal court already decided against you on the breach of contract.", Xerox counsel drafted the following with respect to the breach of contract cause of action:

"1. Evidence submitted and the findings of fact from plaintiff's previous federal court action, from which plaintiff is collaterally estopped from disputing, establish that plaintiff was an at-will employee of Xerox. In addition, the findings of fact in the previous federal court action show that plaintiff was terminated for a legitimate business reason."

At issue in Petitioner's cause of action was whether or not the employment contract had been breached. It was immaterial whether or not Xerox believed it had a legitimate business reason for

the breach.

In ENDLER v. SCHUTZBANK, (1968) 68 California 2nd 162, is an appeal from a Judgment ot the Superior Court of Los Angeles County. The trial court had sustained a demurrer to plaintiff's complaint without leave to amend on the ground that complaint failed to state facts sufficient to constitute a cause of action. The Court of Appeal held that an appellate court must accept as accurate the factual elements of plaintiff's complaint stating at page 165: [1] Given the procedural posture of this case, we must accept as accurate the factual allegations of plaintiff's complaint. (ROSENFIELD v. MALCOLM (1967) 65 Cal.2d 559, 563 [55 Cal.Rptr. 505. 421 P.2d 697]; STANTON v. DUMKE (1966) 64 cAL.2d 199, 201 [49 Cal.Rptr.

380, 411 P.2d 108]; STIGALL v. CITY OF TAFT (1962) 58 Cal.2d 565, 567-568 [27 Cal.Rptr. 441, 375 P.2d 289]; FLORES v. ARROYO (1961) 56 Cal.2d 492, 497 [15 Cal.Rptr. 87, 364 P.2d 263].)

Later, at pages 179 and 180, "In such circumstances," the court concluded, "the due process clause guarantees one the right to have notice of the charges against him and [entitles one] to a hearing on these charges before being dismissed." (Ibid.) Noting the "traditional distaste for an effective defamation without the ability to contest the charges in an impartial tribunal" (id. at p. 679 fn. 14), the court held that the casual "hearing" offered by the hospital could not be "deemed a substitute for the due process of law that the Constitution requires."

(371 F.2d at p. 679 fn. 15.) "[A] full hearing," the court decided, "was the only way [the physician's] substantial interests [in reputation and employability] could have been protected..."

Lastly, in FLYNN v. FLYNN, (1951) 103 California Appellate 2nd 91 (229 Pacific 2nd 5) the Superior Court held the complaint to be insufficient, determined summarily that the agreement attached to the pleading, as approved by the court, was not ambiguous, rejected plaintiff's offer of proof, made and filed findings in accordance with defendant's contention as to the meaning of the agreement and entered judgment in accordance therewith.

The Court of Appeal, at page 97, held: "[7] The court having rejected

appellant's offer of evidence, the filing of findings and judgment was an effective denial of due process of law." (5 Cal.Jur. 875.)

VI.

CONCLUSION

For the foregoing reasons, and each of them, Petitioner, Martin E. O'Malley, respectfully prays that his Petition for a Writ of Certiorari to review the opinion of the Appellate Court of California be granted.

Dated: April 16, 1987

Respectfully submitted

Martin E. O'Malley
Attorney in Propria
Persona for Petitioner

APPENDIX A

No. B018563
(Super.Ct.No. NEC 41120)

COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION TWO

MARTIN E. O'MALLEY,

Plaintiff and Appellant

VS.

XEROX CORPORATION, et al.,

Defendants and Respondents

OPINION

(Stamped) Court of Appeal Second Div.

FILED

Oct 24 1986

Clay Robbins, Jr. Clerk

Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NO. B018563

(Super.Ct.No. NEC 41120)

MARTIN E. O'MALLEY,

Plaintiff and Appellant

v.

XEROX CORPORATION, et al.,

Defendants and Respondents.

(Stamped) Court of Appeal Second Div.
FILED
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Clay Robbins, Jr. Clerk

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Plaintiff, Martin E. O'Malley, appeals from the order granting summary judgment in favor of defendants Xerox Corporation, John M. Jett and Waldamar

W. Miller (hereinafter collectively referred to as "Xerox"). He contends: "[I.] The cause of action in fraud is not barred by the statuted of limitations. [II.] The cause of action in breach of contract is not barred by the doctrines ot resjudicata and collateral estoppel. [III.] The cause of action in breach of contract is not barred by the Statute of Limitations." In his Reply Brief appellant further contends: "The cause of action for infliction of emotional distress is not barred by statute."

On August 23, 1979, appellant, at age 59 years, was hired by Xerox. After a series of reprimands, whose justification he factually disputes, he was discharged on December 5, 1980. On March 12, 1981, he filed suit in federal

court seeking damages for age discrimination, breach of contract, tortious interference with contract and defamation. On January 6, 1983, the court granted Xerox summary judgment by an order that dismissed appellant's claim of age discrimination "on the merits with prejudice" and his remaining state claims upon a federal court's discretionary power to decline to hear pendent claims.

On November 30, 1984, appellant filed his complaint here asserting theories of breach of contract, fraud and infliction of emotional distress. The fraud count alleged that Xerox had promised not to discharge appellant without the benefit of company procedures, a promise it never intended to keep, and, in fact, it did terminate

him without just cause and without following its procedures.

In its order granting Xerox's motion for summary judgment (Attachment A), the superior court ruled that appellant's breach of contract claim presented no triable issues of fact since, based on evidence submitted on the motion and the findings made by the federal court which appellant was collaterally estopped from disputing, appellant was an at-will employee of Xerox who was terminated for a legitimate business reason. It also found that appellant's remaining claims were barred by various statutes of limitations.

A Xerox Internal Memo dated November 24, 1980 ("the memorandum") (Attachment B), prepared for the Vice

President of Personnel who apparently had to approve appellant's discharge because of his age, details appellant's "Background," "Reason for Termination." "Corrective Efforts," and "Alternatives Explored." Its "Summary" concludes with the observation that since appellant would not resign voluntarily, "we have no choice but to request that you approve his separation as rapidly as possible."

Appellant asserts that he first received a copy of this memorandum on December 10, 1985. In his Replay Brief he states, "Prior to receipt of the memorandum on December 10, 1985, appellant believed that his termination was based upon false allegations to supervision that [appellant] was racially bigotted. When the memorandum

was delivered without two of the attachments, appellant was put on notice that the documents did exist that so catagorized [sic] him."

Appellant's contention that his fraud claim is not time barred because he did not discover the facts giving rise to that cause of action until receipt of the memorandum on December 10, 1985, is meritless. He did not commence this action within three years of his discharge and, therefore, his complaint on its face reveals that he exceeded the three-year limitation period prescribed by Code of Civil Procedure section 338, subdivision 4.

Appellant, however, would avoid this bar by claiming the benefit of the "discovery rule" which tolls the

statute until a party has knowledge of those facts essential to his cause of action. (See Saliter v. Pierce Brothers Mortuaries (1978) 81 Cal.App.3d 292, 296.) However, an aggrieved must not be neglectful and must use reasonable and proper diligence to enforce his rights. Thus, an injured party who has knowledge or cause for knowledge of the facts giving rise to his claim will not be 1/ afforded the protection of the rule. (Manguso v. Oceanside Unified School Dist. (1979) 88 Cal.App.3d 725, 730-731.)

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1. Although appellant contends he was not aware of the fraud until December 10, 1985, he concedes in his Opening Brief that he "first conceptualized the [fraudulent] scheme [to discharge him after painting him as a racial bigot and male chauvinist] when drafting the complaint filed on November 30, 1980 [sic, 1984]. The scheme, however, is so bizarre that Plaintiff

It is apparent that appellant has merely recast as fraud his former allegations of breach of contract and wrongful termination. In fact, it is manifest that appellant knew or should have known all of the facts essential to his claim at the time he was discharged. That is to say, if his assertions are true he then knew of Xerox' promise that company policy would be followed before he was discharged, and that he had been discharged without adherence to such policy. Therefore, the "discover rule" provides no shelter and the summary judgment was proper. (C.L. Smith Co. v. Roger Ducharme, Inc. (1977) 65 Cal.App. 3d 735, 741.)

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decided not to state the scheme in the original complaint but to develop the proof of the scheme during discovery. At one point in time, Plaintiff's sanity had been questioned."

We need not decide whether or not appellant's claim for breach of contract was necessarily barred by the doctrine of res judicata and collateral estoppel since it too was not timely filed.[2/]

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2. Concurrently with its order of dismissal, the federal court made Findings of Fact and Conclusions of Law that appellant had not carried his burden of presenting a prima facie case for age discrimination which requires a sowing, inter alia, that appellant was performing his job in a satisfactory manner. The court stated: "28. Even assuming that plaintiff has alleged facts to establish is prima facie case, defendants have articulated a legitimate reason for plaintiff's discharge by asserting that plaintitf was discharged because his supervisors evaluated his performance as unsatisfactory. Plaintiff's November 24, 1980 Professional Performance Appraisal, together with the numerous memos... to plaintiff pointing out the deficiencies in plaintiff's performance, provide substantial evidence that plaintiff's supervisors were of the opinion that plaintiff's performance was unsatisfactory. [¶] 29. Although plaintiff asserts that his performance... was °flawless,'... [t]here is undisputed evidence to

Although appellant alleges the existence of a written contract of employment which he attaches as an exhibit to his complaint, this document does not establish a specified term. As a consequence, it merely constitutes appellant's acceptance of Xerox's offer of "at-will" employment. (Lab. Code, § 2922.) Since it does not "°itself contain a contract to do the thing, for the non-performance of which the action is brought,'" it cannot form the basis of an action for breach of a written contract. (Bank of America v. Security

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support such dissatisfaction."

These findings do indicate that the federal court necessarily determined adversely to appellant the factual issues underpinning his present action for breach of contract, but as noted, we need not rest our holding solely on this point.

Pacific Nat. Bank (1972) 23 Cal.App.3d 638, 645.)

"Whether this cause of action be classified as one for breach of an oral agreement or, more plausibly, as a tort action for interference with contractual relations [citations], it necessarily falls into the category of °[a]n action upon a contract, obligation of liability not founded upon an instrument in writing' (Code of Civ. Proc., § 339, subd. 1), and the two-year limitation is applicable..." (Murphy v. Hartford Acc. & Indem. Co. (1960) 177 Cal.App.2d 539, 543.) Therefore, this count was also properly dismissed under the two-year limitation period set forth in California Code of Civil Procedure

section 339, subdivision (1).[3/]

Appellant's final contention that his claim of infliction of emotional distress is not barred by statute must suffer the same fate for Code of Civil Procedure section 340, subdivision (3) fixes a one-year limitation for the commencement of such actions.

The judgment is affirmed.

NOT FOR PUBLICATION.

S/Gates, J.
GATES

We concur:

S/Compton, ACT. P.J.
COMPTON

S/Beach, J.
BEACH

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3. The period of time between appellant's discharge (December 5, 1980) and the filing of his federal complaint (March 12, 1981) (3 months, 7 days) plus the period of time from the mailing of the federal clerk's notice of ruling of the dismissal of the federal action (January 10, 1983) until the commencement of the present state action (November 30, 1984) (1 year, 10 months and 20 days) totals 2 years, 1 month and 27 days.

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NOV 05 1985
Frank E. Zolin, County Clerk
S/Susan O Neal
by Susan O Neal Deputy

ATTACHMENT A

SUPERIOR COURT OF THE STATE OF

CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MARTIN E. O'MALLEY)
Plaintiff,)
)
vs.)
)
XEROX CORPORATION, a)
corporation; JOHN M. JETT;)
WALDAMAR W. MILLER,)
individuals; DOES 1 through 10)
Defendants.)
)

CASE NO. NEC 41120

SUMMARY JUDGMENT

The motion of Xerox Corporation, John M. Jett and Waldamar W. Miller for summary judgment came on regularly for hearing on November 1, 1985 before this Court in Department B, the Honorable Daniel Fletcher, Judge presiding. Brian L. Becker of Latham & Watkins appeared as attorney for Xerox, Jett and Miller, and Martin E. O'Malley appeared on behalf of himself.

After full consideration of the evidence and points and authorities submitted by both parties, and oral arguments of plaintiff and counsel for defendants, the Court granted the motion on the following grounds:

1. Evidence submitted and the findings of fact from plaintiff's previous federal court action, from

which plaintiff is collaterally estopped from disputing, establish that plaintiff was an at-will employee of Xerox. In addition, the findings of fact in the previous federal court action show that plaintiff was terminated for a legitimate business reason.

2. The claim ot fraud is barred by the statute of limitations found in CCP 338(4).

3. The claim for interference with contractual advantage is barred by the statute of limitations found in CCP 339(1). In addition, Jett and Miller, as agents of Xerox, could not interfere with the employment contract.

4. The claim of intentional infliction of emotional distress is barred by the statute of limitations

found in CCP 340(3).

Because plaintiff's claims raise no triable issue ot any material fact, defendants are entitled to judgment as a matter of law. Having granted the motion,

IT IS ORDERED that plaintiff take nothing and that the action be dismissed on the merits.

Dated: November 5, 1985

S/Daniel Fletcher

Honorable Daniel Fletcher

Internal Memo

To
S.J. McGrath
RTG/Vice President
Personnel

From
R.C. Smith
RTG/EOS Personnel & IR
Pasadena 117
Intelnet 8-844-1561

Subject
Involuntary Separation, case of
Martin E. O'Malley,
Emp.No. 189261

Date
24 November 1980
ATTACHMENT B

Steve, in accordance with the provisions of Personnel Policy 209, your approval to immediately separate Martin E. O'Malley is requested. Although Mr. O'Malley has only 15 months service with Xerox, he is 60 years old and your approval is required.

(Illegible stamp dated) 12/10/85
Clerk US District Court
Central District of California
by S/illegible Deputy

Background

. Martin O'Malley was born January 28, 1920. His education included a law degree from DePaul University, Chicago, Illinois, in 1948. His prior experience at the time he joined XEOS included a stated 20 years in administration of federal contracts and subcontracts. (Employee Profile and Employment Application are Attachments One and Two).

. On August 23, 1979, Mr. O'Malley was hired as a Senior Contract Administrator, exempt grade 8, at a weekly salary of $525.00.

. On October 1, 1979, Mr. O'Malley was placed in a Short Term Disability status due to cardiac problems ("acute interior wall myocardial infraction secondary to

arteriosclerotic heart disease"). Mr. O'Malley returned to work on November 29, 1979. As a consequence of his two months absence, Mr. O'Malley's Performance Appraisal date was recycled to October 23, 1980.

. Mr. O'Malley's Performance Appraisal date was subsequently extended to November 23, 1980, the end of an imposed probationary period.

Reason for Termination

Mr. O'Malley's performance is considered unsatisfactory. He has demonstrated serious lack of attention to detail, lack of preparation and responsiveness in important contract negotiations, and repeated instances of very poor judgment. Mr. O'Malley's performance deficiencies are detailed in his

Performance Appraisal (Attachment Nine) and in the corrective action memos documented below.

Corrective Efforts

The following documentation indicates corrective action measures taken in Mr. O'Malley's case.

. Attachment Three: Memo of august 14, 1980, form J.J. Jett, Manager, Contract Administration, to M.E. O'Malley, confirming the specifics of a performance counseling session that took place August 13, 1980.

. Attachment Four: J.M. Jett memo of September 23, 1980, stating that O'Malley's overall performance was considered unsatisfactory, and establishing a probationary period of sixty days.

. Attachment Five: M.E. O'Malley memo of September 29, 1980, rebutting the probation memo of September 23, 1980.

. Attachment Six: J.M. Jett memo of October 9, 1980, providing guidance on performance areas to be emphasized.

. Attachment Seven: M.E. O'Malley memo of October 13, 1980, questioning the appropriateness of his job classification.

. Attachment Eight: J.M. Jett memo of October 17, 1980, responding to the O'Malley memo of October 13, 1980, and explaining the reasons why certain program assignments were given to O'Malley.

. Attachment Nine: Performance Appraisal given to M.E. O'Malley by J.M. Jett on November 21, 1980. Mr. O'Malley

discussed this Performance Appraisal with J.W. Parchen, Employee Relations and Compensation, on November 21, 1980, and was counselled that he had a right to attach a statement to the Performance appraisal if he disagreed with it. Mr. O'Malley provided, on November 24, 1980. a statement (Attachment Ten) alleging that his Performance Appraisal is inaccurate, and that he is being discriminated against and terminated because of his age.

Alternative Explored

. It is not feasible to reduce M.E. O'Malley to a lower level position. If his program assignments were removed or reduced, another Sr. Contract Administrator would have to be hired to handle the assignment, and Mr. O'Malley

would be redundant to Contract Administration operations.

. Mr. O'Malley's past experience had been exclusively in federal contract administration. There is no other department in XEOS, or any other organization in Xerox, that can use his past vocational experience to advantage.

Summary

Steve, Martin O'Malley is a short-service employee whose deficiencies became quickly and clearly evident. The two months of disability, and the concern that the Contract Administration Department had in bearing down on him too heavily immediately after the disability, delayed corrective action by some months.

Not directly addressed in the

corrective action correspondence, but indicated in the Performance Appraisal, is O'Malley's major deficiency - incredibly poor judgment. He loses sight of (or never recognizes) what is important and what is trivial - and has devoted major amounts of time documenting totally inconsequential actions or omissions, to the detriment of major responsibilities. The best - but not the only - example of O'Malley's faulty judgement concerned an "error" of $1.00 that O'Malley found in a $196,600 contract. Despite specific directions otherwise, O'Malley wrote a memo for file, attempted to delay the printing of the contract to have it retyped, and requested that an associate write a letter to the customer explaining the

"errors" in the bound contract.

Contrary to the comment in O'Malley's statement (Attachment Ten), contract Administration is not overstaffed, and O'Malley will need to be replaced immediately by an external hire.

I won't argue here the lack of merit in the age discrimination charge, but would note that if we actually discriminated against age we would not have hired O'Malley at age 59.

O'Malley has been encouraged to resign - with severance pay through December 31, 1980. Today he indicated that he will not resign voluntarily, and we have no choice but to request that you approve his separation as rapidly as possible.

S/Bob
RCS:bms
Attachments

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 2 DATE: 11/14/86

B018563

Martin E. O'Malley

14462 Wildeve Lane

Tustin, CA 92680

RE: O'Malley, Martin E.

vs.

Xerox Corp.

2 Civil B018563

Los Angeles No. NEC41120

(Stamped) NOV 14 1986

PETITION FOR REHEARING DENIED

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B018563

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

O'MALLEY

v.

XEROX CORP. et al.

Appellant's petition for review DENIED.

(Stamped) SUPREME COURT
FILED
JAN 21 1987
Lawrence P. Gill, Clerk
Deputy

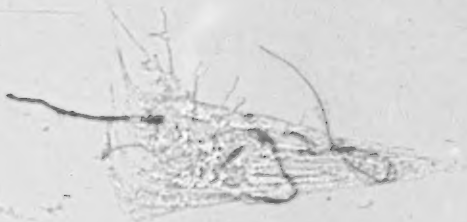
(Stamped) BROUSSARD
Acting Chief Justice

APPENDIX D

APPENDIX D

Summary Judgment of Superior Court dated November 5, 1985 is Attachment A to Appendix A

APPENDIX E



LATHAM & WATKINS
William C. Bottger, Jr.
Brian L. Becker
555 South Flower Street
Los Angeles, California 90071

(213) 485-1234

Attorneys for Defendants
Xerox Corporation, John M. Jett
and Waldamar W. Miller

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MARTIN E. O'MALLEY Plaintiff, vs. XEROX CORPORATION, a corporation; JOHN M. JETT; WALDAMAR W. MILLER, individuals; DOES 1 through 10 Defendants.	))))))))))

CASE NO. NEC 41120

NOTICE OF RULING

TO MARTIN E. O'MALLEY:

PLEASE TAKE NOTICE that the above-entitled Court denied the plaintiff's

Motion for Reconsideration of the Summary Judgment in favor of defendants Xerox Corporation, John M. Jett and Waldamar W. Miller entered on November 5, 1985.

Dated: December 27, 1985

LATHAM & WATKINS
William C. Bottger, Jr.
Brian L. Becker

By S/William C. Bottger, Jr.
William C. Bottger, Jr.
Attorneys for Defendants
Xerox Corporation, John M. Jett
and Waldamar W. Miller

APPENDIX F

Xerox Electro-Optical Systems
300 North Halstead Street
Pasadena, California 91107
213 352-2351

August 20, 1979

Mr. Martin E. O'Malley:
14681 Charloma Drive
Tustin, CA 92680

Dear Mr. O'Malley:

It is a pleasure on behalf of our management group to extend this formal offer to join our staff as Sr. Contract Administrator at a weekly salary of $525. In this position you will report to Mr. John Jett.

As a key member of our staff you will occupy a position of great proprietary sensitivity and importance. This position will use to the fullest your superior background and experience, and will provide the opportunity for significant career growth in the future.

This offer of employment is subject to your executing the Xerox Proprietary Information and Conflict of Interest Agreement, and the review and approval of all listed exceptions by our Legal Counsel. Our offer is also contingent upon your completion and our acceptance of the enclosed medical history form.

You will be eligible for an outstanding array of benefit programs which include an excellent retirement and profit sharing program, company-paid life, medical and dental insurance plans, eleven paid holidays per year and a vacation program.

On the basis of your outstanding record of accomplishments, we are assured that you can make major contributions to the future success of

Xerox Electro-Optical Systems. In so doing you will greatly enhance your personal career progress. We urge you to accept this offer by signing the endorsement block on the enclosed copy of this letter and returning it to us at your earliest convenience.

If you have any questions or if we can provide assistance in your consideration of any aspect of this offer, please call me at 213/351-2351, extension 1422.

Very truly yours,

S/Dan R. Guerrero

Dan R. Guerrero, Manager

Employment & Personnel Relations

DRG:mt

encl.

APPENDIX G

Xerox Electro-Optical Systems
300 North Halstead Street
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DEFENDANTS EXHIBIT 102
FOR IDENTIFICATION
ROBERT V. SELJAS, CSR, NP
9/23 1981
(WITNESS S/O'Malley)

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You will be eligible for an outstanding array of benefit programs which include an excellent retirement and profit sharing program, company-paid life, medical and dental insurance plans, eleven paid holidays per year and a vacation program.

On the basis of your outstanding

record of accomplishments, we are assured that you can make major contributions to the future success of Xerox Electro-Optical Systems. In so doing you will greatly enhance your personal career progress. We urge you to accept this offer by signing the endorsement block on the enclosed copy of this letter and returning it to us at your earliest convenience.

If you have any questions or if we can provide assistance in your consideration of any aspect of this offer, please call me at 213/351-2351, extension 1422.

Very truly yours,

S/Dan R. Guerrero

Dan R. Guerrero, Manager

Employment & Personnel Relations

DRG:mt

encl.

DATE: 8/23/79

START DATE: 8/23/79

OFFER ACCEPTED: S/Martin E. O'Malley

APPENDIX H

APPENDIX H

is Attachment B to Appendix A

APPENDIX I

DECLARATION OF BRIAN L. BECKER

1. I am an attorney duly licensed to practice law in the State of California and am an attorney with the law firm of Latham & Watkins, attorneys of record in this action for defendants Xerox Corporation, John M. Jett, Waldamar W. Miller and Louis Karagianis. I am personally familiar with the facts set forth in this Declaration and could and would testify to those facts if called as a witness.

2. On November 1, 1985, I appeared before this Court on a hearing for summary judgment in this lawsuit. The Court granted the summary judgment, but seemed to indicate that Plaintiff would be granted leave to amend. On the afternoon of November 1, 1985, I called

the clerk for Department B of the Northeast Judicial District of the Los Angeles Superior Court to ask clarification of the ruling. I was told that any mention of leave to amend in the granting of the summary judgment had been inadvertent. Accordingly, I prepared a judgment dismissing the action and made no mention of leave to amend. A true and accurate copy of the Notice of Ruling with the attached Summary Judgment is attached hereto as Exhibit A.

3. Attached hereto as Exhibit B is a true and accurate copy of Plaintiff's First Amended Complaint as it was received by me in the mail.

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. . . . .

. . . . .

. . . . .

Executed this 6th day of December, 1985 at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

S/Brian L. Becker
Brian L. Becker